Supreme Court, U.S.
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IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1994

RICHARD A. DUNCAN	)	CASE NO. 94 335
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
GEORGE BLINEBERRRY, et al.	)	
	)	
Respondents.	)	

RESPONDENT'S BRIEF
IN OPPOSITION TO PLAINTIFF'S
PETITION FOR CERTIORARI

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Petitioner, Pro Se

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I. STATEMENT OF THE CASE

Statement of Facts:

Relator, Richard Duncan, purchased Lot No. 231 in Ravenna Township, Portage County, Ohio. The transaction was via a Sheriff's sale due to delinquent taxes. All pertinent zoning resolutions as to area requirements were in effect as of the date of the purchase.

On November 30, 1993, Relator applied for four (4) variances with respect to area requirements. Relator requested that a duplex be built on the vacant land. The lot being only 31 feet in width did not meet the zoning requirements of the Ravenna Township Zoning Resolutions as to sidelots and setback allowances. The hearing on this variance request was set for December 14, 1993.

Prior to that hearing, Relator filed a second application on the same property. In this application, Relator again requested variances with respect to area requirements, in order to construct a single family residence. This hearing was originally set for January 11, 1994. The matter was reset and heard on March 8, 1994.

At the hearings set for December 14, 1993, and March 8, 1994, the respective applications were denied.

Procedural Posture

Relator applied for area variances for a 31 foot vacant lot purchased at a Sheriff's Sale. Applications were filed for a duplex and a single family dwelling on November 30 and December 8, 1993, respectively. The second application was filed prior to any

hearing on the first. The initial application was denied on December 14, 1993, and March 8, 1994, the second request was denied. Relator has never made a proper appeal to the Common Pleas Court of the Ravenna Township Board of Zoning Appeals' decisions. Instead, Relator has filed a Mandamus action in the Ohio Supreme Court. That original action was dismissed, and Relator has failed to file any inverse condemnation proceedings in the Portage County Common Pleas Court and any other State court.

II. LAW AND ARGUMENT

The facts alleged by Plaintiff do not give rise to a claim under the Fifth and Fourteenth amendments of the U.S. Constitution. It is axiomatic that a government entity "may execute laws or programs that adversely affect recognized economic values". Penn Central Transportation Co. v City of New York (1978), 57 L.Ed. 2d 631, 638. Hence, assuming there has been a taking for purposes of this motion only, it is only when there is a failure to compensate a landowner that a violation occurs.

The United States Supreme Court has held that a federal taking claim is not yet ripe for adjudication until state remedies have been expended. Williamson County Regional Planning Commission v Hamilton Bank (1985), 87 L. Ed. 2d. 126

> " A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the state has provided for doing so. The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. * * * Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a 'reasonable, certain, and adequate provision for obtaining compensation' exist at the time of the taking." Citations omitted. Id. at 143-144.

A property owner can not claim a violation in federal court for a taking without just compensation, until it has used the state procedures for inverse condemnation, and been denied such compensation. Id. The Court reasoned that the state's action or "taking" was not complete until compensation had been denied.

Plaintiff in the case at bar has not availed himself of state

procedures, nor are those procedures inadequate. Until those state remedies are fully utilized, a taking claim is premature and must be dismissed. Id. at 145. Accordingly, Respondent respectfully requests that this Court deny Plaintiff's petition for certiorari.

III. CONCLUSION

For the above stated reasons, Portage County Solid Waste District's motion to dismiss should be granted as the Court has no subject matter jurisdiction over the action, and Plaintiffs have failed to state a claim upon which relief can be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the within Motion to Dismiss has been sent by regular U.S. mail to Richard A. Duncan, 14827 North State Ave., Middlefield, Ohio 44062 this 12 day of October, 1994.

Denise L. Smith

DENISE L. SMITH, Ohio Reg. #0017811
Chief Assistant Prosecuting Attorney